Teik as arranged. He held himself out as able to pass and accept the prints of the second consignment to the standard of the first, and it is manifest that the latter were inferior.

Under these circumstances and on the facts I have found, I enter judgment for the plaintiff against the defendant on item (a) of the claim. As regards item (b) the unsatisfactory sarongs are in Court and I order them to be delivered to the defendant. The plaintiff is entitled to costs.

Judgment for the plaintiff

MOHAMED YATIN BIN ABU BAKAR v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Spenser-Wilkinson, J.) February 13, 1950]

[Kuala Lumpur — Criminal Appeal No. 33 of 1949]

Penal Code, ss. 511 and 420 — Attempted cheating — Burden of proof — Duty of the prosecution to produce all material evidence at the trial — Use of Police report — Criminal Procedure Code, s. 108A.

This was an appeal against a conviction under sections 511 and 420 of the Penal Code. It was alleged that the accused had submitted false hotel bills and he had claimed the expense from the Customs Department in which he was employed and had thereby attempted to cheat them. The learned Sessions Judge in his grounds of judgment said that he regarded the defence version which was that accused and his wife had in fact stayed at the hotel as unlikely and that he believed the evidence of the prosecution witnesses who said accused and his wife did not come to stay at the hotel. It appeared that a material witness— an English-speaking clerk at the hotel — was not called by the prosecution and that the Police report was put in as an exhibit without the person making the report being called.

Held, (1) that it is not the correct approach to a decision in a criminal case to approach the question of the guilt or innocence of the accused on the basis of deciding which of two stories the Court should believe, but the Court should consider whether the story of the accused has thrown a reasonable doubt on the truth of the prosecution case and, if so, the accused is entitled to an acquittal; (2) that the prosecution should in this case have called the English-speaking clerk at the hotel, as he was a material witness; and (3) that as the person who made the report was not called as a witness the report should not have been admitted in evidence.

Cases referred to :—

(1) *Ng Lam v. Public Prosecutor* (1939) F.M.S.L.R. 8; (1940) M.L.J. 74.

(2) *Rex v. Abramovitch* 24 Cox's Criminal Cases 591.

(3) *Loh Chak Wan v. Public Prosecutor* (1937) F.M.S.L.R. 68; (1939) M.L.J. 84.

(4) *Osman Khan v. Public Prosecutor* (1948) M.L.J. 56.

(5) *Chan Thim v. Public Prosecutor* (1949) M.L.J. 72.

(6) *Rex. v. Hamilton* 87 L.J. K.B. 734.

(7) *Woolmington v. Director of Public Prosecutions* (1935) A.C. 463.

(8) *Mancini v. Director of Public Prosecutions* (1942) A.C. 1.

(9) *Rex v. Garth* 33 Cr. App. R. 100.

APPEAL from Sessions Court.

R. P. S. Rajasooria for the appellant.

C. M. Sheridan for the respondent.

The facts and arguments sufficiently appear from the Judgment.

Cur. Adv. Vult.

Spenser-Wilkinson, J. : — The appellant was charged in the Sessions Court at Kuala Lumpur as follows :—

That you on or about 10.8.49 at Port Swettenham being a public servant to wit R.O.D.O. No. 418 did attempt to cheat the Customs Department by submitting a false voucher claiming an expense of $202.60 being $38.50 in excess of what was legitimately due to you regarding your transfer from Butterworth to Port Swettenham, an offence punishable under Sections 511 and 420, Penal Code.

The following statement of the facts is taken from the grounds of decision of the President of the Sessions Court :—

The case concerns four receipts, P2a, P2b, P2c and P2d, which are allegedly from the Simla Hotel, Penang. These receipts claimed that the accused expended the sum of $38.50 in respect of board and lodging in the Simla Hotel, over the period of the 30th and 31st July. The crux of the Prosecution case was that the accused and his family never went near the Simla Hotel. To prove this they relied on the evidence of P.W.3, the Hotelkeeper of the Simla Hotel, and P.W.4, one of his assistants. P.W.3 stated that he had never seen the accused before; that he was certain that the accused never stayed in his Hotel on the night of the 30th/31st July; that the receipts as produced by the accused were not in the form or the chop which are issued by his Hotel; that the signature on the receipts, K.M. Ismail Ghaus, meant nothing to him and thereby that none of his employees bear that name. He produced P3a, P3b and P3c, on each of which was a different chop. These three forms and these three chops are the forms and chops used by him when giving receipts.

The appellant being called upon for his defence gave evidence on his own behalf and also called his wife. The gist of their evidence was that they did stay two nights in this hotel; that the appellant did receive the receipts from P.W. 4 although he did not see him writing them out and that he had paid the money represented by the receipts.

The learned President accepted the evidence of the 3rd and 4th prosecution witnesses and rejected the evidence of the appellant and his wife and accordingly convicted the appellant and sentenced him to two

months rigorous imprisonment. Mr. Rajasooria, who argued the appeal on behalf of the appellant, attacked the evidence of the 3rd prosecution witness on the ground that it was clear that he never spent the period between 7.00 p.m. and 5.00 a.m. at his own hotel and did not really know who his lodgers were. He attacked the evidence of the 4th prosecution witness on the ground that he had denied in examination in chief ever having issued any receipts but admitted in cross-examination that he had occasionally issued receipts. Mr. Rajasooria also pointed out that the hotel register referred to by the prosecution witnesses was not produced and that the grounds of decision of the learned President were based on the view that it was only the 4th prosecution witness who could have given these receipts which were made out in English whereas the evidence showed that there was at least one other employee in this hotel who could read and write English.

There was a discrepancy between the evidence of the 3rd and 4th prosecution witnesses on this point. In his evidence the 3rd prosecution witness, the proprietor of the hotel, stated that he had 14 employees; that they were all young persons; and that except for K. M. Mohamed Ibrahim, the 4th prosecution witness, none of them could read or write English. The 4th prosecution witness, however, stated definitely that there was a clerk whose duty it was to enter the details in the hotel register in English. In his grounds of decision the learned President states :—

"I was satisfied that they (3rd and 4th prosecution witnesses) had not issued any receipts to the accused nor had anyone else in that hotel issued any receipts to the accused."

I find it difficult to understand how the learned President could have been satisfied from the evidence that no one other than the 3rd and 4th prosecution witnesses had issued receipts in the light of the admission that there was an employee capable of writing English who might have written these receipts and who was not called as a witness. Why this important witness was not called is not explained. It may be that the prosecution did not know of his existence until he was mentioned in the evidence of prosecution witness No. 4. Nevertheless it seems strange, if the case was properly investigated, that the existence of this witness was not discovered and the importance of his evidence appreciated. If this clerk does not exist, then the evidence of the 4th prosecution witness can have little value.

In considering the value of the evidence for the defence the President stated that the defence version struck him as being unlikely partly because it seemed odd to him that the accused had to go to Penang from Butterworth and stay two nights there in a hotel before going south to Kuala Lumpur. I must confess that I can see nothing unlikely in a person in Butterworth, who is seeking hotel accommodation, going across to Penang for this purpose. There is no evidence on the record as to the availability of accommodation in Butterworth but I doubt if there is much accommodation there and, if this be so, I should have thought it would be the natural course to go across to Penang where there are plenty of hotels. In the absence of any evidence that there was suitable accommodation available at Butterworth I do not think this criticism of the defendant's story was altogether justified.

Reading the learned President's grounds of decision as a whole it seems to me that he tended to approach the question of the guilt or innocence of the accused on the basis of deciding which of two stories he should believe. In my opinion this is not the correct approach to a decision in a criminal trial except, perhaps, in those cases where the law casts the burden of proof upon the accused. In such cases the accused discharges the burden upon him if he establishes a balance of probability in his favour *Ng Lam v. Public Prosecutor*[1]. In the present case there was no burden of proof on the accused and Mr. Rajasooria referred to the case of *Rex v. Abramovitch*[2]. The local case of *Loh Chak Wan v. Public Prosecutor*[3] appears to have been based on the decision in *Rex v. Abramovitch* and has, in turn, been followed in *Osman Khan v. Public Prosecutor*[4]; in *Chan Thim v. Public Prosecutor*[5]; and in other local cases. *Abramovitch's* case has been the subject of a good deal of comment in the Courts in England and has been criticised and explained in *Rex v. Hamilton*[6]; *Woolmington v. Director of Public Prosecutions*[7]; *Mancini v. Director of Public Prosecutions*[8]; and finally in *Rex v. Garth*[9]. It would appear from the judgment of the Lord Chief Justice in *Rex v. Garth* that some of the expressions used in the local cases above-mentioned have been too wide. It has to be borne in mind that *Garth's* case and *Abramovitch's* case were both cases of receiving stolen goods in which the explanation given by the prisoner went to the question of whether or not he knew that the property was stolen. The case of *Loh Chak Wan v. Public Prosecutor* was also a case where a special burden was cast upon the accused of giving an explanation. In this class of case the proper application of the general principle as to burden of proof is explained by the Lord Chief Justice in *Rex v. Garth* as follows :—

"Possession of property recently stolen, where no explanation is given, is evidence which can go to the

jury that the prisoner received the property knowing it to have been stolen. It must be borne in mind that the onus is always on the prosecution; but if the prisoner gives an explanation which raises a doubt in the minds of the jury on the question whether or not he knew that the property was stolen, then the ordinary rule applies and the case has not been proved to the satisfaction of the jury, and therefore the prisoner is entitled to be acquitted."

In an ordinary case, where no special burden of proof or explanation is by law cast upon the accused, his position is more favourable than it is in those cases where the law presumes something against him. The principle laid down in the recent English cases, particularly *Mancini v. Director of Public Prosecutions* appears to me to be that, where no special onus is cast by law upon the accused, then, if his story has the effect of raising a reasonable doubt as to the truth of the prosecution case, he is entitled to an acquittal; and this is the "ordinary rule" which is referred to in the passage above quoted from *Rex v. Garth.* In this country, at the close of the case for the prosecution the Court will not call upon the accused for his defence unless the evidence of the prosecution witnesses is, in the first instance, believed. If, when called upon for his defence the accused gives evidence, then the question is, not which story is to be believed, but whether, even if the Court is not inclined to accept all that the accused has said, his evidence does not raise a reasonable doubt as to the truth of the prosecution evidence or as to the accused's guilt.

I think that in the case before me the President, to some extent, misdirected himself on the burden of proof, and that he did not pay sufficient attention to the discrepancies in the evidence to which I have referred. Moreover, the facts that the English speaking clerk who kept the hotel register was not called as a witness and that the hotel register was not produced, were defects in the presentation of the case by the prosecution which do not appear to have been noticed.

There is one further matter which was not mentioned in the argument before me but to which I think it desirable to draw attention — the admission of the 4th Exhibit, which is a report or complaint made to the police by the Assistant Comptroller of Customs, Selangor and Pahang West. The admission of this report was not objected to and it may be that, in admitting it, the President had in mind the provisions of section 108A of the Criminal Procedure Code which have sometimes been misunderstood in Subordinate Courts. This section merely provides machinery whereby a police report can be proved by means of a certified copy instead of producing the report book itself — it does not in any way affect the provisions of the Evidence Enactment regarding the admissibility of statements of persons not called as witnesses. The person who made this report was not called as a witness and no evidence was given that he was not available. Therefore the report was inadmissible and should not have been either tendered or received in the evidence. One paragraph of this report reads as follows :—

"The claim for lodging allowance on 31st July, 1949 is false as there is evidence that the Outdoor Officer left Prai by the night mail on 31st July, 1949 and not on 1st August as would appear from the bill."

I can find no satisfactory evidence on the record to show that the appellant actually left Prai by the night mail on 31st July, 1949 and therefore the allegation in this wrongly admitted report that the claim for lodging allowance for 31st July, 1949 was false was clearly prejudicial to the appellant. It is true that this document is nowhere referred to by the President in his grounds of decision and it may be that he did not attach much importance to it. Nevertheless the possibility that the statement may have had some influence upon the mind of the President in reaching his conclusions on the evidence must be taken into consideration in favour of the appellant.

In view of the considerations mentioned above I do not think this conviction can stand. If the only defect in the trial had been the failure of the prosecution to call the English speaking clerk and to produce the hotel register I would not have been prepared to allow the prosecution a second chance to prove their case — all the available evidence which is material ought to be produced at the trial, or an explanation given of its absence, and failure to do this will be liable, as a rule, to result in the conviction being quashed. In the present case, however, I am of opinion, in view of the other matters to which I have referred, that my proper course will be to direct a fresh trial before a different President. I accordingly set aside the conviction and sentence and order that the accused be re-tried.

In view of the fact that there is only one President in Kuala Lumpur and that the more important witnesses (including the English-speaking clerk above referred to) are in Penang I direct that the fresh trial take place before the President, Sessions Court at Penang.

Re-trial ordered.